APEX MINING CO.
INC., JERRY W. WILLIAMS

IBLA 84-841
84-570 Decided April 30, 1985

Appeals from decisions of the Eastern States Office, Bureau of Land Management, conforming certain coal leases to reflect requirement to pay balance of bonus bids and cancelling one coal lease. ES-26900, ES-26904, ES-27218, ES-27222, and ES-27227.

Affirmed in part, set aside in part, and remanded.

1. Coal Leases and Permits: Leases--Mineral Leasing Act: Generally
   The Bureau of Land Management may properly conform a competitive coal lease to set forth the specific deferred bonus bid and schedule for payment in accordance with the terms of the lease sale. By submitting its bid, the lessee has already agreed to such a deferred bonus bid payment where the term was included in the detailed statement of the lease sale and was incorporated into the contract upon acceptance of the bid and subsequent lease issuance.

2. Coal Leases and Permits: Cancellation--Mineral Leasing Act: Generally

   Bureau of Land Management may not cancel a competitive coal lease by administrative action, but must institute an appropriate judicial proceeding under 30 U.S.C. § 188(a) (1982) where, subsequent to lease issuance, the lessee failed to pay timely an installment of the deferred bonus bid, and the annual rental as required by the lease which failure constituted cause for cancellation.

APPEARANCES: R. McKim Norris, Jr., Esq., Birmingham, Alabama, for appellants; Kenneth G. Lee, Esq., Branch of Eastern Resources, Division of Energy and Resources, Office of the Solicitor, Alexandria, Virginia, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Apex Mining Company, Inc. (Apex), and Jerry W. Williams (Williams), have appealed from various decisions of the Eastern States Office, Bureau of Land Management (BLM), conforming four coal leases, ES-26900, ES-26904, ES-27222, and ES-27227, to reflect the requirement to pay the balance of the bonus bids (IBLA 84-570) and cancelling one coal lease, ES-27218 (IBLA 84-841). Appellants' coal leases were all issued pursuant to section 2 of the Mineral Leasing Act, as amended, 30 U.S.C. § 201 (1982), after competitive bidding. 1/

By various notices published in the Federal Register, BLM notified interested parties that the tracts involved herein would be offered for sale and, with the exception of ES-26900, BLM stated that "[b]idding instructions and bidder qualifications are included in the Detailed Statement of the Lease Sale." 2/ The record contains a copy of a "Detailed Statement" with respect to each of the five tracts offered for sale, which states, in pertinent part, that each sealed bid must be accompanied by a deposit of one-fifth of the amount bid and that the balance of the bonus bid shall be paid on a "deferred basis" as follows: "The balance shall be paid in equal annual installments due and payable on the first four anniversary dates of the lease. If a lease is relinquished or otherwise terminated, the unpaid remainder of the bid shall be immediately payable to the United States."

In response to the advertised lease sales, appellants submitted bids accompanied by one-fifth of the bonus amounts. By various decisions, BLM accepted appellants' bids and required execution of the lease forms and payment of the first year's rentals. 3/ BLM reiterated in each decision accepting the high bid that: "The balance of the bonus bid shall be paid in equal installments due and payable on the first four anniversary dates of the lease." Thereafter, appellants submitted the executed lease forms and first year's rentals.

BLM subsequently issued leases to appellants, which provides in section 30 that: "This lease is issued subject to the payment of $__ by the

1/ Appendix A identifies the various leases, including the name of the lessee, the amount of the bonus bid, the date of the lease sale and the effective date of the lease. Appendix B sets forth the name of the lease tract, the description of the land in the tract, and the number of acres involved with respect to each of the leases. All of the land was patented to private parties, with a reservation of the coal to the United States. 2/The following is a list of the various Federal Register notices involved herein: 46 FR 28955 (May 29, 1981) (ES-26900); 46 FR 28956 (May 29, 1981) (ES-26904); 46 FR 57349 (Nov. 23, 1981) (ES-27218); 47 FR 36706 (Aug. 23, 1982) (ES-27222); and 47 FR 36704 (Aug. 23, 1982) (ES-27227).
3/ The dates of these decisions are as follow: Sept. 22, 1981 (ES-26900 and ES-26904); Mar. 18, 1982 (ES-27218), and Oct. 12, 1982 (ES-27222 and ES-27227).

lessee as a deferred bonus. Payment of the deferred bonus by the lessee shall be made on a schedule specified in section 31 (Special Stipulations) of this lease." In addition to the failure to state the amount of the deferred bonus, no schedule was specified in the leases. Section 5 of the lease terms provided that an "annual rental of $ 3.00 for each acre or fraction thereof shall be paid in advance on or before the anniversary date of this lease."

The record indicates that, with respect to leases ES-26900, ES-26904, and ES-27218, BLM issued, pursuant to 43 CFR 3452.2-2, a "notice of default" in November 1983, which stated that the lessee had neglected to pay the second installment of the deferred bonus bid and the second year's rental. BLM required appellants to pay that amount within 30 days or to "submit evidence showing why the lease should not be cancelled for default." BLM further stated that: "Should the lease be cancelled or terminated for any reason, all deferred bonus payments shall be immediately payable and all rentals already paid or due, shall be forfeited to the United States (43 CFR 3452.3(b))." By letter dated December 9, 1983, appellants objected to the notices of default, stating that: "We have received no indication that any money was due on these leases as the executed copies of the leases which we hold indicate that no further money is due."

In subsequent decisions dated March 21 and 28, 1984, with respect to all of the five leases involved herein, BLM stated that section 30 of appellants' leases had "inadvertently" failed to state the amount of the deferred bonus bid and that section 31 had not listed the payment schedule. BLM noted that the "Detailed Statement" of the lease sale had declared that the balance of the bonus bid was "payable in four equal installments due on the first four anniversary dates of the lease." BLM amended the leases to reflect the exact amounts of the deferred bonus bids and the scheduled dates for payment. The March 1984 BLM decisions also granted appellants "30 days from receipt of this decision" to pay the installments of the deferred bonus bids and the annual rentals which appellants had failed to pay timely "or the lease will be subject to cancellation," pursuant to 43 CFR 3452.2-1.

Appellants subsequently filed an appeal from the March 28, 1984, BLM decisions with respect to leases ES-26900, ES-26904, ES-27222, and ES-27227, which was docketed as IBLA 84-570. 4/ BLM took no further action with respect to these leases. However, by decision dated July 6, 1984, with respect to lease ES-27218, BLM cancelled the lease, pursuant to 43 CFR 3452.2-1, because it "has been in default since July 1, 1983, and notice has been duly given." BLM required appellant to submit the second year's rental and the remainder of the bonus bid. Williams subsequently filed an appeal from the July 1984 BLM decision with respect to lease ES-27218, which was docketed as IBLA 84-841.

4/ Apex also filed an appeal from the Mar. 21, 1984, BLM decision, with respect to lease ES-27218, which was docketed as IBLA 84-571. By order dated May 21, 1984, the Board dismissed the appeal because it was not filed timely in accordance with 43 CFR 4.411, which thereby deprived the Board of jurisdiction to entertain the appeal.

In their statements of reasons for appeal, appellants contend that they cannot be required to pay the balance of the deferred bonus bids in accordance with the designated payment schedules and that the coal leases cannot be cancelled for default on the basis of this requirement because the leases are "contract[s] of adhesion," dictated by BLM which was in a superior bargaining position. Moreover, appellants argue the leases did not provide either the amounts of the bids due or the schedules for payment. Further, appellants assert they had no actual or constructive notice of these facts. Appellants also argue that the leases cannot be amended to reflect these facts without the consent of the lessee, in accordance with section 31, and that this matter should be submitted to negotiation between the parties or arbitration. In the alternative, appellants contend that the leases should be amended to reflect "changed conditions" by extending the time for payment of the balance of the deferred bonus bids. Appellants allege, after issuance of the leases, there was a drop in the demand and price for coal; some surface owners would not consent to mining operations, which BLM knew or should have known; and BLM is "unwilling" to grant appellants' requests for royalty rate reductions to reflect local prevailing market rates, which "agents" of BLM assured appellants would be granted. Appellants argue that the leases are "commercially impossible" to perform in such circumstances.

In answers to appellants' statements of reasons, BLM contends that, regardless of whether the coal leases set forth the amounts of the bids due or the schedules for payment, appellants were required to pay the amount due timely where the bids upon acceptance incorporated the notice of lease sale and the "Detailed Statement," and the decisions accepting appellants' bids reiterated the requirement. BLM concludes that appellants had both actual and constructive notice of the requirement. BLM argues that, in any case, it was entitled to conform the leases to include the language contained in the sale notice but inadvertently omitted from the lease, citing Anadarko Production Co., 66 IBLA 174 (1982), aff'd., Anadarko Production Co. v. Watt, Civ. No. 82-1278C (D.N.M. Nov. 4, 1983). Finally, BLM contends that it was entitled to cancel lease ES-27218 where appellant failed to pay the second installment of the deferred bonus bid in accordance with the payment schedule since this constituted the "purchase price" or consideration for the lease upon acceptance of appellant's bid. BLM argues that appellant is not excused from paying this "purchase price" because of a change in circumstances after lease issuance due to denial of a royalty rate reduction request or denial of consent by the surface owners to enter the land. BLM asserts that appellant has not filed a royalty rate reduction request and is not precluded from entering the land.

[1] The applicable regulation in the case of competitive coal leases, 43 CFR 3422.4, provides that upon acceptance of a qualified bid, BLM shall send copies of the lease form to the successful bidder, to be completed, signed, and returned and that, in addition, the successful bidder shall "pay the balance of the bonus bid, if required." Upon receipt of the executed copies of the lease form and other required documents, "the authorized officer shall execute the lease." Id. The regulation also provides that:

> At least half of the acreage offered for competitive lease in any 1 year shall be offered on a deferred bonus payment basis. In a

> deferred bonus payment, the lessee shall pay the bonus in 5 equal installments; the first installment shall be submitted with the bid. The balance shall be paid in equal annual installments due and payable on the next four anniversary dates of the lease. If a lease is relinquished or otherwise cancelled or terminated, the unpaid remainder of the bid shall be immediately payable to the United States.

Id. Thus, under the regulations, BLM may choose to require payment of the full balance of the bonus bid or to provide for a "deferred bonus payment" upon acceptance of a qualified bid. In the present case, each of the BLM decisions, accepting appellants' bids and requiring execution of enclosed lease forms, specifically provided that the "balance of the bonus bid shall be paid in equal installments due and payable on the first four anniversary dates of the lease." 5/

Despite adequate notice of BLM's decision to incorporate a "deferred bonus payment" into each lease, appellants now object to the March 1984 BLM decisions which sought to conform the leases to the terms of the lease sale, i.e., specifically set forth the amounts of the bonus payments due and the schedules for payment where BLM had previously failed to do so. Appellants note that section 31 of the leases provides that: "SPECIAL STIPULATIONS -- * * * These stipulations may be revised or amended, in writing, by the mutual consent of the Lessor and the Lessee at any time to adjust to changed conditions or to correct an oversight." Appellants contend they did not consent to changes in the lease terms. However, we conclude that BLM was entitled to conform appellants' leases to reflect the terms of the lease sale contract between the parties to which appellants had previously consented.

It is well established that by submitting a bid the bidder agrees to be bound by the terms and conditions set forth in the notice of sale, including the detailed statement incorporated therein, and that upon acceptance of the bid there arises a contract between the parties for the issuance of a coal lease with those same terms and conditions. Coastal States Energy Co., 80 IBLA 274, 279 (1984), and cases cited therein. The Board has previously held that: "To hold otherwise * * * would violate the equal opportunity for all bidders to compete on a common basis for leases." Anadarko Production Co., supra at 176. Thus, appellants' bids must be deemed to have incorporated the requirement in the detailed statement for payment of the balance of the bonus bid on a deferred basis as defined in 43 CFR 3422.4(c). By submitting

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5/ As BLM points out on appeal, this was merely a reiteration of the statement made in "Detailed Statement" which, with the exception of lease ES-26900, was specifically incorporated in the notices of the lease sales published in the Federal Register. Further, the requirement for payment of the deferred balance of the bonus in equal installments on the next four anniversary dates of the lease is stated in the regulations at 43 CFR 3422.4. Thus, appellants are deemed to have constructive notice in each case, as well as actual notice, of the requirements for payment of the deferred bonus. 44 U.S.C. § 1507 (1982); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

the bids, appellants had already agreed to this provision. 6/ The requirement was then incorporated in the contracts to issue the leases upon acceptance of the bids and became part of the subsequent leases. Viewed in this light, the March 1984 BLM decisions did not "amend" appellants' leases but merely conformed the terms thereof to reflect the agreement between the parties. Regarding appellants' assertion that the leases are contracts of adhesion we note that the amount of the bonus bid which appellants have refused to pay is, by the nature of a competitive lease sale, a term set by the offeror/lessee. We, therefore, affirm these decisions.

[2] Williams also challenges the cancellation of lease ES-27218. Appellant was given 30 days from receipt of both the November 1983 BLM decision, which constituted a "notice of default," and the March 1984 BLM decision amending the lease to pay the second year's rental and the second installment of the deferred bonus bid, which were originally due on July 1, 1983, the anniversary date of the lease. There is no evidence that appellant paid timely in either respect and appellant does not contend that he paid. As noted above, the requirement to pay the balance of the deferred bonus bid and the schedule for payments was incorporated in the lease. Appellant, however, argues that he should be granted an extension of time to make the deferred bonus payments because of a decline in the coal market, BLM's unwillingness to grant a royalty rate reduction, and the lack of consent by certain surface owners to mining operations. The regulation at 43 CFR 3452.2-2, provides that, along with a notice of default, a lessee "shall * * * be afforded 30 days to correct the default, to request an extension of time in which to correct the default, or to submit evidence showing why the lease should not be cancelled." Appellant has had since July 1, 1983, to pay the second year's rental and the second installment of the deferred bonus bid, in accordance with the terms of the lease, and has been in default since that time. Moreover, appellant has made no request for an extension of time prior to filing these appeals. Regardless of whether appellant is entitled to a reduction in his royalty rate pursuant to 43 CFR 3473.3-2(d) or whether appellant is hindered in mining operations because of market conditions or problems obtaining access to the surface of the land, 7/

6/ The bids for each of the leases, which were typewritten and signed by the bidder, expressly stated both the total amount of the bonus bid and the amount submitted with the bid, which latter sum was described in each case as "1/5 of total amount." Thus, the record is very clear as to the amount of the consideration for the lease sale.

7/ Appellant had the right to request a reduction in the royalty rate. There is no evidence in the record that any such application is pending before the Department. We note that the sale notice stated that BLM would entertain such a request in order to bring the royalty rate down to the level of the "prevailing market rate in the area," but that BLM could not guarantee a reduction. In addition, appellant had the right to request a suspension of operations and production under the lease pursuant to 43 CFR 3483.3 because of the economic infeasibility of continued mining due to changed market conditions. See Lone Star Steel Co., 84 IBLA 77 (1984). However, rather than request a royalty rate reduction or a suspension, appellant apparently chose not to pay his annual rental or deferred bonus bid. Appellant must accept the consequences of that choice.

by virtue of holding an outstanding coal lease, appellant is required by the terms thereof to make a timely payment of the annual rental and installments of the deferred bonus bid. Failure to make such payments will constitute cause for cancellation under 43 CFR 3452.2-1(a), which provides that a lease may be cancelled for "defaults in the performance of any of the terms, covenants, and stipulations of the lease."

Section 31(a) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(a) (1982), provides that the appropriate method for cancelling a lease, where the lessee "fails to comply with any of the provisions * * * of the lease," is "an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located." See also 43 CFR 3452.2-1(a). This statutory provision applies to postlease events and does not affect BLM's authority to cancel a lease on the basis of prelease factors. Boesche v. Udall, 373 U.S. 472 (1963). BLM argues on appeal that it cancelled appellant's lease on the basis of a prelease factor. We disagree. Prior to issuance of a lease, BLM, upon accepting a bid, as noted above, may require a bidder to pay all of the balance of the bonus bid or provide for a deferred bonus payment in accordance with 43 CFR 3422.4. In the present case, BLM chose the latter. Appellant's subsequent default, therefore, was based on a requirement which arose and became binding on appellant prior to the issuance of the lease. However, at the time of default, the requirement to make deferred bonus payments had been incorporated into the lease. It was not a condition precedent to issuance of the lease. See Malcolm N. McKinnon, A-29979 (June 12, 1964). Therefore, by failing to make a timely payment, appellant violated a provision "of the lease." 30 U.S.C. § 188(a) (1982). The same is true of appellant's failure to pay the annual rental in a timely fashion. The court in Boesche v. Udall, supra at 484, made clear that the Secretary need not resort to a judicial proceeding in order to cancel a lease which was "erroneously issued," i.e., where the lease should not have been issued because the lessee was either unqualified, not entitled to a lease, or had defaulted on some obligation prior to issuance of the lease. The court stated that section 31(a) of the Mineral Leasing Act, supra, requiring judicial proceedings, "does not cover a situation where * * * the lease has not been issued at the time the breach of the Act or regulations occurs, for there is at that time no lease to cancel." Id. at 479. Likewise, we have concluded that section 31(a) does not apply where a lease is invalid from its inception. James W. Smith, 6 IBLA 318, 79 I.D. 439 (1972). That is not the situation herein. Thus, we conclude that BLM improperly cancelled appellant's lease by administrative action. We must set aside the July 1984 decision and remand the case to BLM for institution of an appropriate proceeding pursuant to 30 U.S.C. § 188(a) (1982) to cancel appellant's lease.

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fn. 7 (continued)

Further, we note that the coal reservation to the United States in the various patents of the land included the right to prospect for, mine, and remove the coal subject to the limitations set forth in section 3 of the Act of June 22, 1910, 36 Stat. 584 (1910). This right reserved to the United States and its lessees includes the right to enter and occupy the surface of the land "for all purposes reasonably incident to the mining and removal of the coal therefrom." Id.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions conforming coal leases ES-26900, ES 26904, ES 27222, and ES 27227 are affirmed and the decision cancelling coal lease ES 27218 is set aside and remanded to BLM for further action consistent herewith.

C. Randall Grant
Jr. Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

R. W. Mullen
Administrative Judge.

Appendix A

Lease No.	Name of Lessee	Amount of Bonus Bid	Date of Lease Sale	Effective Date of Lease
ES-26900	Apex Mining Co., Inc.	$ 22,321.00	June 25, 1981	Feb. 1, 1982
ES-26904	Apex Mining Co., Inc.	4,309.50	June 25, 1981	Feb. 1, 1982
ES-27218	Jerry W. Williams *	49,300.00	Dec. 16, 1981	July 1, 1982
ES-27222	Jerry W. Williams *	73,031.90	Sept. 15, 1982	Mar. 1, 1983
ES-27227	Jerry W. Williams *	100,834.10	Sept. 15, 1982	Mar. 1, 1983

* The record indicates that, although Williams is the president of Apex, the bids for these leases were made by Williams as an individual and that the leases were issued in his name, and not that of Apex.

Lease	Tract	Description of Leased Area	Number of Acres	No.	Name
				ES-26900	Goodwin Creek
		SE 1/4 SE 1/4 sec. 19 SW 1/4 NE 1/4, W 1/2 NW 1/4, SE 1/4 NW 1/4 sec. 30 T. 12 S., R. 10 W. Huntsville Meridian, Walker County, Alabama	201.21		
ES-26904	Upper Springs Church	NE 1/4 SE 1/4 sec. 34 T. 16 S., R. 9 W. Huntsville Meridian, Fayette County, Alabama	38.94		Sulfur Creek
ES-27218	Jess	W 1/2 NE 1/4 sec. 7 E 1/2 SE 1/4 sec. 17 SW 1/4 NE 1/4, NW 1/4, E 1/2 SW 1/4, W 1/2 SE 1/4 sec. 20 NW 1/4, E 1/2 SW 1/4, NW 1/4 SW 1/4, SE 1/4 sec. 21 T. 14 S., R. 9 W. Huntsville Meridian, Walker County, Alabama	1971.63		NE 1/4, W 1/2 SW 1/4,
ES-27222	Little Tyro Creek	SW 1/4 NE 1/4, SW 1/4 NW 1/4, NW 1/4 SW 1/4 sec. 31 T. 16 S., R. 9 W. SE 1/4 NE 1/4, SE 1/4 NW 1/4, N 1/2 SE 1/4 sec. 36 T. 16 S., R. 10 W. N 1/2 N 1/2, SW 1/4 NE 1/4, S 1/2 NW 1/4 sec. 1 T. 17 S., R. 10 W. Huntsville Meridian, Tuscaloosa County, Alabama	561.50		
ES-27227	Flatwoods	SE 1/4 SW 1/4 sec. 20 SW 1/4 sec. 21 SW 1/4 NE 1/4, NE 1/4 NW 1/4 sec. 28 W 1/2 NE 1/4, NE 1/4 NW 1/4, NE 1/4 SW 1/4, NW 1/4 SE 1/4 sec. 29 T. 16 S., R. 9 W. Huntsville Meridian, Fayette County, Alabama	478.00		